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IN THE

Supreme Court of the United States

October Term, 1976

No. 76-870

MINNESOTA PUBLIC INTEREST RESEARCH GROUP,

Petitioner,

vs.

SECRETARY OF AGRICULTURE; JOHN V. McGUIRE, individually, and as Chief, United States Forest Service; JAY CRAVENS, individually, and as Regional Forester; HAROLD ANDERSON, individually, and as Supervisor, Superior National Forest; CONSOLIDATED PAPERS, INC.; THE NORTHWEST PAPER COMPANY; NORTHERN FOREST PRODUCTS, LTD.; KAINZ LOGGING COMPANY; EMIL ABRAMSON; BOISE CASCADE CORPORATION; and SIERRA CLUB,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

Elliot C. Rothenberg
Michael Milgrom
3036 University Avenue S.E.
Minneapolis, MN 55414
(612) 376-7554
Counsel for Petitioner

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The petitioner Minnesota Public Interest Research Group respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Eighth Circuit entered in this proceeding on August 30, 1976.

REPORTS OF OPINIONS IN THIS CASE DELIVERED BY COURTS BELOW

1. 358 F. Supp. 504 (D. Minn. 1973), 5 ERC 1251.
2. 498 F. 2d 1314 (CA 8 1974), 6 ERC 1694.
3. 401 F. Supp. 1276 (D. Minn. 1975).
4. 541 F.2d 1292 (CA 8 1976), 9 ERC 1220.

GROUNDS ON WHICH JURISDICTION OF THIS COURT IS INVOKED

Judgment of the United States Court of Appeals for the Eighth Circuit entered on August 30, 1976. Denial of petitioner's timely petition for rehearing dated September 28, 1976. Jurisdiction of this Court is conferred by 28 U.S.C. §1254(1).

QUESTIONS PRESENTED FOR REVIEW

1. Whether the Secretary of Agriculture can implement part of a proposed plan for the sale of timber in the last large virgin forest in the eastern United States, and allow commercial logging there, without disclosing the rest of the plan for logging the area and without filing the detailed statement required by the National Environmental Policy Act (NEPA) 83 Stat. 852, 42 U.S.C. §4321 et seq. The question is governed by the court's opinion in *Kleppe v. Sierra Club*, — U.S. —, 49 L.Ed. 2d 576, 96 S.Ct. 271 (1976).

2. Whether the Secretary of Agriculture has the discretion, under the provisions of the Wilderness Act, 78 Stat. 890, 16 U.S.C. §1131 et seq. to manage the forests of a designated wilderness for the purpose of changing it

to what he regards as a more desirable composition through the use of commercial logging.

STATUTORY PROVISIONS INVOLVED

Wilderness Act of 1964, 78 Stat. 890, 16 U.S.C. §1131 et seq.

National Environmental Policy Act, 83 Stat. 852, 42 U.S.C. §4321-§4332

Special Regulations for the Boundary Waters Canoe Area, 36 C.F.R. §293.16

STATEMENT OF THE CASE

On November 24, 1972, the Minnesota Public Interest Research Group brought this action to enjoin the United States Forest Service from engaging in further logging of virgin forest areas of the Boundary Waters Canoe Area (BWCA) in Minnesota. The BWCA is an area located within the Superior National Forest and designated as a unit of the National Wilderness Preservation System created by the Wilderness Act of 1964, 78 Stat. 890, 16 U.S.C. §1131 et seq. The BWCA covers some 1,030,000 acres of land, 540,000 of which are virgin forest, that is forest which has resulted entirely from natural factors rather than man-influenced factors such as logging, planting, and seeding. The BWCA contains the only substantial contiguous areas of virgin forest in the United States east of the Rockies and its virgin forest areas are larger than most Wilderness Areas west of the Rockies. The BWCA offers unique opportunities for wilderness recreation and research.

The Forest Service, which is charged with managing the entire Superior National Forest, has been engaged in

selling timber in the BWCA to commercial timber companies and does so pursuant to an arbitrary division of the BWCA into two zones by regulation (36 C.F.R. §293.16). The Forest Service permits logging in the Portal Zone which contains approximately 400,000 acres, 147,000 of which are virgin forest. All of the timber sales by the Forest Service are in virgin forest areas. No commercial logging is allowed in the Interior Zone which now contains approximately 600,000 acres.

The sales which are the subject of this action were made by the Forest Service to some of the private respondents during the period from 1959 to 1968. On all the sales the original term during which timber cutting was to have been completed had expired. The Forest Service granted unilateral extensions on the terms of these contracts in 1971 and 1972. The question raised at the first trial in this case was whether these extensions (and modifications of the contracts which occurred simultaneously) were subject to the requirements of the National Environmental Policy Act. Additionally, petitioners submitted that logging of virgin forest areas of the BWCA was prohibited by the Wilderness Act.

The District Court ruled that the extension and modifications were subject to NEPA and that the decision to extend or modify should have been preceded by an environmental impact statement (358 F. Supp. 584). Petitioner's Wilderness Act argument was held in abeyance pending determination by the Forest Service on whether it would continue to allow logging in the BWCA virgin forest. The Eighth Circuit affirmed the ruling that an EIS was required (498 F. 2d 1314).

In July of 1974 the Forest Service announced that its

new Management Plan and EIS for the BWCA were available (39 F. Reg. 25524, July 11, 1974). The Management Plan and EIS ostensibly were intended to cover all aspects of management of the BWCA but the treatment of timber management was incomplete, part of it being left for a timber management plan for the entire Superior National Forest, which has yet to be published.

Petitioner, joined by the Sierra Club, renewed this action on August 19, 1974, challenging the adequacy of the EIS and resubmitting its Wilderness Act argument. The District Court held (401 F. Supp. 1276) that the EIS was inadequate and that the Wilderness Act prohibited logging in the virgin forest of the BWCA.

On appeal to the Eighth Circuit, government respondents argued that the details on timber management missing from the Management Plan were forthcoming in a Timber Management Plan for the entire Superior National Forest. The private respondents argued that the legislative history of the Wilderness Act demonstrated that commercial logging was to be allowed in virgin areas. Petitioner argued that the purpose of the Wilderness Act and the plain meaning of the provisions of the Act governing the BWCA evinced a desire to preserve the virgin forest, and that the regulations promulgated by the Secretary of Agriculture and the present BWCA Management Plan had the objective of managing the forest for the purpose of changing its composition—an objective violative of the Wilderness Act. Petitioner also supported the District Court holding regarding violations of NEPA.

The Eighth Circuit ruled that logging was a legitimate management tool for the BWCA, that the Secretary of Agriculture had the discretion to allow logging in the

BWCA for whatever purposes he might choose, and that the EIS was adequate with respect to the six existing sales but not with respect to any future sales (541 F. 2d 1292, Appendix at A-224). On that basis, the court lifted the injunction with respect to the existing sales of timber but continued it for any future sales pending preparation of the Superior National Forest Timber Management Plan and its accompanying EIS.

A petition for rehearing dated September 11, 1976 was denied on September 28, 1976. Application for stay of mandate pending disposition of application for writ of certiorari was denied by the Eighth Circuit on October 19, 1976. Application for Recall of Mandate was filed with this Court on October 25, 1976 and denied on November 8, 1976.

REASONS WHY THE WRIT SHOULD BE GRANTED

I.

THE DECISION BELOW MISAPPLIES AND CONFLICTS WITH PRIOR DECISIONS OF THE U.S. SUPREME COURT AND OTHER COURTS CONCERNING THE REQUISITES OF ENVIRONMENTAL IMPACT STATEMENTS UNDER THE NATIONAL ENVIRONMENTAL POLICY ACT.

The National Environmental Policy Act of 1969 (NEPA), 42 U.S.C. §4321 et seq., requires, in §4332 (Appendix at A-8):

> The Congress authorizes and directs that, to the fullest extent possible . . . all agencies of the Federal Government shall—
>
> . . .

> (c) include in every recommendation or report on proposals for legislation and other major Federal actions affecting the quality of the human environment a detailed statement by the responsible official on—
>
> (i) the environmental impact of the proposed action,
>
> (ii) any adverse environmental effects which cannot be avoided should the proposal be implemented,
>
> (iii) alternatives to the proposed action,
>
> (iv) the relationship between local short-term uses of man's environment and the maintenance and enhancement of long-term productivity, and (v) any irreversible and irretrievable commitments of resources which would be involved in the proposed action should it be implemented.

As the Court of Appeals' opinion (at A-251) pointed out, the recent decision in *Kleppe v. Sierra Club*, — U.S. —, 49 L.Ed. 2d 576, 44 USLW 5104 (June 28, 1976) held that a comprehensive environmental impact statement (EIS) would be required where proposed federal actions will have a "cumulative or synergistic" impact upon the area. All such actions must be considered together in the comprehensive EIS.

> Thus, when several proposals for coal related actions that will have cumulative or synergistic environmental impact upon a region are pending concurrently before an agency, their environmental consequences must be considered together. Only through comprehensive consideration of pending proposals can the agency evaluate different courses of action. 49 L.Ed. 2d at 590, 44 USLW at 5109-10.

In the particular circumstances of the *Kleppe* case the Supreme Court reversed an injunction against proceeding

with leasing certain parcels of land for coal development, with each lease covered by a separate EIS, until the agency had completed a regional environmental impact statement for the development of a four-state region. In so doing, the Supreme Court stressed that the agency concerned had denied the existence of an overall plan for regional development of coal and that the evidence on this point was not sufficient to contradict the agency's denial.

In the current litigation, by contrast, the Court of Appeals found that there is an overall plan for logging in the Boundary Waters Canoe Area (BWCA) and that the EIS submitted to the District Court is inadequate as to any logging except the existing sales, or contracts to cut timber.

> Although the EIS and Management Plan adequately describe the environmental impacts and alternatives with respect to the existing sales, the overall plan for logging in the future is incomplete. The Plan and EIS are designed to serve as the Forest Service's major decision-making tools for ten years. Yet neither contain any criterion, beyond that relating to the existing sales, for determining what sites are to be logged, when the logging will take place, at what rate the logging will take place or what species will be logged. (p. A-251).

Astonishingly, in spite of this failure to disclose even the most elementary information necessary to assess the impact of planned future logging in virgin timber areas of the BWCA, the Court below lifted the injunction against logging under the current sales which it had affirmed in its earlier decision in this litigation, 498 F. 2d 1314 (1974). Nevertheless, logging in the BWCA under

the Forest Service's ten year plan will have cumulative effects upon the BWCA. The effects of current and future sales are sufficiently interrelated to mandate consideration by a comprehensive EIS before the injunction against logging on current sales should be lifted. The decision of the Court of Appeals to permit logging before submission of the comprehensive EIS it held to be required conflicts squarely with *Kleppe v. Sierra Club*.

For purposes of NEPA and the preparation of environmental impact statements, there is no logical or empirical reason for segregating present logging from future logging. The Management Plan and EIS submitted by the Forest Service to the District Court contained no separate management directions for present as distinct from future sales nor any indication whatsoever that present logging was anything but an integral part of the overall timber harvesting policy. Quite to the contrary, the evidence demonstrated that the present logging will have a cumulative and synergistic impact upon the BWCA. This is true despite the fact that the current sales may involve only 5000 acres of uncut timber, according to a footnote (p. A-251) in the decision under review. As the District Court found in its first decision, the actual number of acres affected by logging could be considerably greater than the acres which actually will be cut (p. A-91) Moreover, the ostensibly small acreage notwithstanding, what is of critcial importance is not merely the number of acres which are to be logged but the location of logging operations and particularly the cumulative impact of present and future logging upon the remaining large contiguous blocks of virgin forest.

The District Court in its first decision recognized that permitting even a minimal degree of logging in one area

could inevitably serve as a foot in the door leading to ever greater incursions into the given area of virgin forest.

> The Court is concerned about what has been called the "nibble effect." The "nibble effect" refers to the process whereby the Forest Service makes a timber sale that carves out an incursion into a virgin forest area and then uses that incursion to justify further timber sales in that area. The Court feels that some of the areas to be cut this winter may be used to justify additional timber sales in the future, and thus may well have an effect on an area far larger than the area physically affected by the logging planned for this winter. (p. A-92).
>
> Whereas many of the active timber sales in the BWCA are small sections of areas which already have been logged or are cut off from the main virgin forest areas of the BWCA by large areas which have been logged, many involve areas of virgin forest that are contiguous with the main virgin forest areas of the BWCA. While the logging planned for this winter represents relatively small intrusions into such areas, it is nonetheless true that they would be significant intrusions. (p. A-93).

This decision was affirmed by the Eighth Circuit Court of Appeals in 498 F. 2d 1314 (1974).

In the decision under review, the Court of Appeals reemphasized the danger of fragmenting the remaining large blocks of virgin forest in the BWCA and explained that a comprehensive EIS, which the Forest Service has yet to provide, was consequently required.

> We adhere to the view implicit in our prior opinion that a comprehensive EIS is required in this case. The EIS before us is adequate in most respects. However, more specific information is needed to apprise the decision makers as to where, when, what species of trees, and at what rate logging will occur in the Portal Zone throughout the life of the Plan. This information is needed to determine not only how many areas will be logged, but which areas will be affected so that fragmentation of the remaining large blocks of virgin forest can be avoided. Furthermore, as scientific, educational and recreational demands increase in the area, this information is necessary to keep the decision makers informed as to the best available multiple use policy for the area.
>
> . . .
>
> Under these circumstances, we think it appropriate to disolve the permanent injunction only with respect to the existing timber sales. The Forest Service concedes that the BWCA EIS and Management Plan were not intended to comprehensively analyze the environmental effects of timber management in the BWCA. Nonetheless such analysis is necessary. (p. A.-251—A-252).

The Forest Service itself acknowledged that fragmentation of large contiguous blocks of virgin forest is the crux of the problem posed by logging in the BWCA. For example, the Environmental Analysis Report for the West Tofte Sale stated:

> The major irreversible situation is the encroachment on the contiguous virgin area of the BWCA. . . . The encroachment on this virgin area will result in a reduction of the area in the BWCA suitable for wilderness research of virgin stands. In evaluating this situation, we must consider what this loss means in terms of other areas still available for wilderness research. There are still large areas in the interior zone available and also many stands in the portal zone

> will not be cut. However, we will lose a large contiguous area to research and when compared to the entire land base in the United States that fits these criteria, then the loss takes on greater importance. This loss is unavoidable under the proposed action. Government Exhibit 46, p. 23-24.

There was considerable additional evidence that cutting under the present sales cannot fairly be dismissed as being only a "negligible incursion" (p. A-251) into the virgin forests of the BWCA but rather that the present virgin forest blocks already are of minimal size for important scientific research.

> Even the largest virgin blocks, including the threatened sales and Portal Zone virgin areas, are already of minimal size for studies of large-scale ecosystem questions such a prey-predator relationships in a natural ecosystem, studies of the natural role of insects, plant disease, or windstorms in a forest system, or studies of the natural role of fire. These virgin areas could also provide sites for the education of the general public in understanding complex ecosystems and the ecological problems facing mankind. Affidavit of petitioner's witness M. Heinselman at 10.

In its first decision in this case, the Court of Appeals affirmed an injunction against commercial logging in the Portal Zone of the BWCA pending completion by the Forest Service of its BWCA Management Plan and accompanying EIS, 498 F. 2d 1314 (8th Cir. 1974). It observed then that "The Forest Service contemplates that the impact statement to be filed will cover all facets of their new BWCA Management Plan, including the Forest Service policy on timber cutting" (p. A-114). However in its brief

submitted to the Court of Appeals in the second appeal, the Forest Service conceded that its Management Plan and EIS did not adequately analyze the environmental effects of logging in the BWCA.

> There was never a suggestion made that this Plan purported to be the ultimate analysis of the environmental effects of timber management in the BWCA. In fact, the Forest Service is currently preparing the Timber Management Plan for the Superior National Forest, of which the BWCA is a part. This Timber Management Plan, on which an EIS will also be filed, will provide more detailed consideration on such subjects as sale site selection, harvest rates and mitigation measures. (Brief of Government Appellants, p. 35)

The Forest Service provided no reason whatever for differentiating present from future sales for purposes of environmental analysis, for bifurcating consideration of the effects of logging in the BWCA between present and future sales, or for failing to provide a comprehensive environmental impact statement when the District Court and Court of Appeals had ordered the preparation of such a document previously.

In an abdication of judicial responsibility under the National Environmental Policy Act, the Court below permitted logging to resume on bare assurances by the Forest Service that a more detailed management plan and accompanying EIS are forthcoming and will be legally adequate (p. A-252). This decision would allow—even encourage—agencies so disposed to circumvent the *Kleppe* requirement of a comprehensive EIS. By the subterfuge of supplying no more than pro forma plans and impact statements covering only current activities together with prom-

ises of more detailed and more comprehensive management plans and environmental impact statements in the future, these agencies could continue present activities undisturbed by injunctions. Such evasion of NEPA could not have been the intention of *Kleppe v. Sierra Club*.

The error in the Eighth Circuit Court's interpretation of *Kleppe v. Sierra Club* is made more manifest by a recent decision of the Second Circuit Court of Appeals in *National Resources Defense Council v. Nuclear Regulatory Commission*, — F. 2d —, 9 ERC 1414 (2d Cir., Sept. 8, 1976). Basing its decision entirely on *Kleppe*, the second Circuit held that until an adequate comprehensive EIS was prepared with respect to the Commission's decision to proceed to general commercial licensing of a new nuclear technology, the Commission would be enjoined from proceeding with interim licensing even though an EIS was submitted to the Court which purportedly covered the environmental impact of that interim licensing. The decision emphasized that

> interim impact statements drafted in accordance with presently existing Commission rules and precedents would necessarily result in impact analyses inadequate under NEPA. 9 ERC at 1415.

Following *Kleppe*, the Court held that all licensing, even that denominated "interim," would be enjoined pending completion of a comprehensive EIS.

Far from counterbalancing the considerations presented above, the Court below did not explain any necessity for permitting logging now on existing sales before the preparation of the comprehensive EIS it held to be required. In its first decision in this litigation, 358 F. Supp. 584

(1973), the District Court found that there would be no deleterious economic effects from enjoining logging on current sales pending submission of an adequate EIS.

> The private defendants . . . would not be greatly injured by an injunction proscribing all logging in the BWCA pending the Forest Service's impact statement because they all have enormous reserves of timber of the same type that they planned to have cut in the BWCA this winter. Thus, the only injury to the private defendants . . . will be the increased costs, if any, of having more timber cut on their own land or on their other timber sales. (p. A-88-A-89). Also see p. A-32-A-40 for more detailed discussion).

The Court of Appeals affirmed in 498 F. 2d 1314 (1974). In its second decision, 401 F. Supp. 1276 (1975), the District Court made similar findings.

> While it appears that there would be some harm to the private defendants from the loss of virgin forest as a source of forest products pending the completion and filing of an adequate EIS, no urgent need for production has been shown. These defendants can satisfy most of their needs from alternative sources of supply. In fact, the evidence showed that the defendants can obtain adequate sources of timber even if the BWCA were to be permanently closed to all logging operations. (p. A-222)

Although the decision under review lifted the injunction, it made no finding of error regarding the above-quoted paragraph. Thus, neither the District Court nor the Eighth Circuit Court of Appeals has found in any of the four decisions in this case that there is an economic necessity to log virgin timber on the current sales before an adequate

comprehensive environmental impact statement has been prepared.

The District Court's first decision spoke of the irreplaceable and priceless quality of the BWCA.

> In conclusion, the Court notes that witness after witness spoke in almost reverent tones of the rare beauty, the scenery, the solitude and the "oneness with nature" that they found while in the BWCA. It was termed a gem, a jewel, and likened to a rare antique of ancient vintage. The evidence clearly showed that there is no area like it nor can there be another of its kind. (p. A-29).

In the decision under review, the Court of Appeals quoted with approval the statement in the Draft Management Plan of the Forest Service which referred to the BWCA as "unique, pristine, endangered, rugged, primitive, beautiful and fragile" (p. A-226)

With the prospect of irreparable damage to such a unique and irreplaceable resource so great, and with the potential economic gains so small, petitioner respectfully submits that prudence would dictate a review of the Eighth Circuit Court of Appeals' reversal of the Minnesota District Court's decision to enjoin any logging until the Forest Service has prepared a comprehensive environmental impact statement which would fully disclose the effects of present and future logging in the BWCA.

II.

THE DECISION BELOW GRANTS THE SECRETARY OF AGRICULTURE UNLIMITED DISCRETION TO MANAGE WILDERNESS AREAS FOR PURPOSES INCONSISTENT WITH THE DECLARED OBJECTIVE OF THE WILDERNESS ACT.

A. Congress enacted the Wilderness Act for the purpose of preserving wilderness areas from destruction by bureaucratic fiat. The act has been held to impose a statutory limit on agency discretion in managing areas with wilderness characteristics.

The Wilderness Act, 78 Stat. 890, 16 U.S.C. §1131 et seq.[1] contains an extensive, yet specific, section on the purpose for its enactment.

> In order to assure that an increasing population accompanied by expanding settlement and growing mechanization, does not occupy and modify all areas within the United States and its possessions, leaving no lands designated for preservation, it is hereby declared to be the policy of the Congress to secure for the American people of present and future generations the benefits of an enduring resource of wilderness. For this purpose there is hereby established a National Wilderness Preservation System to be composed of federally owned areas designated by Congress as "wilderness areas," and *these shall be administered* for the use and enjoyment of the American people *in such manner as will leave them unimpaired for future use and enjoyment as wilderness, and so as to provide for the protection of these areas, the preservation of their wilderness character, and for the gathering and dissemination of information regarding their use and enjoyment as wilderness;* and

[1]Appendix at A-1 - A-6.

> no Federal lands shall be designated as "wilderness areas" except as provided for in this Act or by a subsequent Act. 16 U.S.C. §1131(a). (Emphasis supplied).

The Act designated those areas classified by the Secretary of Agriculture and the Chief of the Forest Service as "wilderness," "wild," or "canoe" as areas to be included in the National Wilderness Preservation System.[2]

Other areas were to be included after further study. The reason for including these areas in the system, although they were already being managed to preserve their character, was to prevent any changes in their status from occurring without an act of Congress. Thus, the House Report on the Wilderness Act legislation states that:

> Except for the Boundary Water Canoe Area, none of the areas has been granted statutory recognition.[3] Having been established by administrative action of the executive branch, any of the wilderness, wild and primitive areas could be similarly de-classified and abolished by administrative action. In the alternative the administrators could, if they so desired, change the rules governing the uses allowed or prohibited within such areas. *House Report No. 1538, Interior and Insular Affairs Committee,* 88th Cong. 2nd Sess., (July 2, 1964), 1964 USCCAN at 3616.

[2]16 U.S.C. §1132(a). The BWCA was, and is, the only designated "canoe" area.

[3]Statutory recognition of the BWCA was given by the legislation referred to at 16 U.S.C. §1133(a) (2) (Appendix at A-4). These laws prohibited most logging within 400 feet of lakes, streams, and portages and authorized the Secretary of Agriculture to purchase land within those areas. These statutes did not give protection to the rest of the land area of the BWCA. The actual boundaries of the BWCA were set entirely by administrative regulation until passage of the Wilderness Act.

The same intent, to prevent changes in the use of Wilderness Areas, except by Act of Congress, was evidenced in the Senate report on S. 4, a bill identical to that which was enacted.

> As part of the wilderness preservation system, they would be preserved in their primitive condition, as nearly as possible devoid of the works of man, unless Congress or the President of the United States determine that other use of some portion is in the greater public interest. *Senate Report No. 109, Committee on Interior and Insular Affairs,* 88th Cong., 1st Sess., (April 3, 1963) at 1. (Emphasis supplied.)

The Act has been interpreted by the courts in light of this statutory purpose. In the case of *Parker v. United States,* 448 F.2d 793 (CA10 1971) cert. denied 405 U.S. 989 (1972), the Tenth Circuit held that the Wilderness Act imposed a statutory limit on agency discretion and that the limitation was contained in the definition of wilderness as well as the particular section applicable to that case.[4] The case concerned a Forest Service sale of timber in an area contiguous to a designated "primitive" area. 16 U.S.C. §1132(b) required the Secretary of Agriculture to study all the areas which he had classified as "primitive" and recommended to the President which areas should be included in the Wilderness Preservation System. It gave the President discretion to designate additional areas contiguous to the primitive areas for inclusion. The *Parker* court held that the Secretary could not destroy the wilderness character of this area by logging because this would infringe on the power of the President to designate it a wilderness. This was done despite the fact that

[4]448 F.2d at 797.

the Secretary had studied the area and determined that it did not have wilderness characteristics. The Secretary's findings were overruled by the District Court and the Tenth Circuit. Moreover, the court refused to allow a circumvention of its holding by a sale of timber that would have logged the area in question except for a buffer strip along the boundary of the contiguous primitive area. Thus, the court affirmed the mandate of the Act that the decision of whether or not an area is to remain a wilderness is not for the Secretary of Agriculture (as it had been prior to the Act) but for the President and Congress.

B. The management plan proposed by the Forest Service for the Boundary Waters Canoe Area is contrary to the mandates of the Wilderness Act.

The Wilderness Act prohibits commercial enterprise, including logging, within designated wilderness areas.[5] It also prohibits permanent roads[6] and requires that wilderness areas be managed as to preserve their wilderness characteristics:

> Except as otherwise provided in this Act, each agency administering any area designated as wilderness shall be responsible for preserving the wilderness character of the area and shall so administer such area for such other purposes for which it may have been established as also to preserve its wilderness character. Except as otherwise provided in this Act, wilderness areas shall be devoted to the public purposes of recreational, scenic, scientific, educational, conservation, and historical use. 16 U.S.C. §1133(b).

[5]16 U.S.C. §1133(c).
[6]*Ibid.*

The Act contains two special provisions relating to the BWCA. One section reaffirms prior statutory protection of the BWCA.[7] The Act provides further that:

> Other provisions of this Act to the contrary notwithstanding, the management of the Boundary Waters Canoe Area, formerly designated as the Superior, Little Indian Sioux, and Caribou Roadless Areas, in the Superior National Forest, Minnesota, shall be in accordance with regulations established by the Secretary of Agriculture in accordance with the general purpose of maintaining, without unnecessary restrictions on other uses, including that of timber, the primitive character of the area, particularly in the vicinity of lakes, streams, and portages: Provided, That nothing in this Act shall preclude the continuance within the area of any already established use of motorboats. 16 U.S.C. §1133(d) (5).

The administrative history of the BWCA indicates that logging was allowed in the Portal Zone of the BWCA[8] only for the limited purpose of sustaining that portion of the local economy dependent upon logging.[9] However, the 1974 Management Plan proposed for the BWCA declared a different objective for management of the BWCA:

[7]16 U.S.C. §1133(a) (2). The objectives of these statutes are summarized at f. 3 *supra*.
[8]A 1941 regulation, now codified as 36 C.F.R. 293.16, and contained in the Appendix, divided the BWCA into two zones—Portal and Interior. Commercial logging is permitted in the Portal Zone only. The zones serve no other purpose save to define the area in which logging is permitted. The Interior Zone has been enlarged twice since 1941 by the addition of areas recently logged. There is no biological difference between the forests of the Interior Zone and those of the Portal Zone. Both zones contain some areas which have been logged and some which are virgin.
[9]See 1937 Management Plan for the BWCA at p. 1. 1948 Management Plan at p. 10.

> In short, the policies are aimed at perpetuating a variety of successional stages, and the diversity of vegetation communities and hence will produce long-term favorable effects.[10]

The Management Plan then sets out policies for management of the BWCA forests consistent with these objectives including in the Portal Zone commercial logging, non-commercial logging[11] and use of herbicides and insecticides.

This reversal in policy—from one aimed at preserving primitive character with minimum impact on the economy to one of management for other purposes—was the culmination of a process which began in 1964 with the appointment of a Boundary Waters Canoe Area Review Committee (the Selke Committee) by the Secretary of Agriculture. In formulating a management policy for the BWCA forests the committee relied upon concepts of forest management geared to national parks and recreation areas, not on wilderness management concepts. The committee decided that the forests of the BWCA should be managed to produce a forest of long-lived species, red and white pine, which its forestry experts considered to be aesthetically superior.

The 1974 BWCA Management Plan itself acknowledges that the significance of the BWCA as a timber resource is highly debatable.[12] More important, it explicitly denies any economic motive for allowing commercial logging to continue and insists that commercial logging is utilized merely as a management tool to promote the aesthetic and

[10]1974 Management Plan and EIS at p. 5.
[11]Referred to as "administrative cutting."
[12]BWCA Management Plan and EIS at 28.

recreational qualities of the area.[13] At trial it was brought out that this objective has nothing whatever to do with either the Wilderness Act objectives of preservation of natural conditions or the objective declared by 16 U.S.C. §1133(d) (5) for the BWCA: preserving the primitive character of the area.[14]

The Appeals Court noted petitioner's argument as set forth above but said that it would not interfere with the management function of the Secretary of Agriculture and that he had the discretion to use logging for any purpose.[15] However, later in its opinion[16] the Court affirmed the management policy of the Forest Service, claiming that all parties agreed that the forests must be managed and holding specifically that timber harvesting is a controllable management tool.[17]

Thus, the consequence of the Appeals Court holding is that the Forest Service would be allowed to use a narrow exception to the ban on commercial logging in Wilderness Areas as a door through which to pull the concept of management of Wilderness Areas for varied purposes.

[13]*Ibid.* at p. 15-16.
[14]Petitioner has contended throughout that "primitive character" as used in 16 U.S.C. §1133(d) (5) means essentially the same thing as "wilderness" defined in 16 U.S.C. §1131(a). Examination of Forest Service officials showed that they have no definition whatever of "primitive character." The Appeals Court also declined to define the term.
[15]At A-234.
[16]At A-254.
[17]This is a misstatement of petitioner's position. All parties agree that wildfire was the natural agent which brought about the continued regeneration of the forests before the coming of man. They also agree that continued supression of wildfire by the Forest Service will alter the natural process. Petitioners contend, however, that if the Forest Service feels it must continue to suppress wildfire but wants to continue the natural regeneration process it should use controlled fire, a process which has been used in western Wilderness Areas but is still experimental in the BWCA. Government experts agreed that use of controlled fire would be possible in five to ten years and that it was not necessary to log areas pending development of controlled fires in order to continue the regeneration process.

C. The differences between a natural and man-made forest are significant. The BWCA contains a unique natural ecology which would be destroyed by the policy the Secretary proposes.

The District Court made extensive findings on the effects of logging on the natural forests of the BWCA concluding that the differences between a man-made forest and the primitive forest are significant and that logging destroys the primitive character of the areas affected. These effects are detailed at 358 F.Supp. 609-617, A-57-A-73. The Appeals Court affirmed that the effects of logging on virgin forests were sufficient to require an environmental impact statement.[18] The District Court reaffirmed its earlier findings in its second opinion[19] and these findings were undisturbed on appeal.

The BWCA contains the last significant remnants of the eastern conifer forest, a forest that once stretched across the east from Minnesota all the way to Maine. The natural food chains and ecology are unusually complete. It is the last area in the lower 48 states where the eastern timber wolf can still be found in its natural habitat and is the home of many other rare and endangered plants and animals. It is the only place in the continental U.S. where some of these plants and animals can be seen and studied in their natural setting. This fragile natural environment will be altered under the management goals and objectives adopted by the Forest Service.

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[18]See opinion at A-110 - A-112. Moreover, the Appeals Court held that the significance of the effects was an indicator that the action was "major" within the meaning of NEPA.

[19]Appendix at A-131.

D. The Wilderness Act requires that units of the National Wilderness Preservation System be managed so as to preserve their natural conditions.

The Wilderness Act specifically directs the agencies which manage the Wilderness Areas to manage them so as to preserve their wilderness character.[20] The Act defines "wilderness" to mean "an area which is protected and managed so as to preserve its natural condition . . ."[20a] The opening section of the Wilderness Act listed three ways in which management of wilderness areas was to be directed.

1. leave areas unimpaired for future use and enjoyment as wilderness.

2. protect and preserve wilderness character,

3. gather and disseminate information regarding their use and enjoyment as wilderness.[20b]

The last mentioned is of particular note. The virgin forests of the BWCA are already of minimal size for the purposes of certain types of scientific study. They represent the last area available for large scale study of the natural ecosystem of the forests which once stretched half-way across the country. The fact that the existing commercial sales involve only a few thousand acres is irrelevant in this regard since the Appeals Court opinion grants discretion to the Secretary of Agriculture to log as much of the BWCA as he desires.

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[20]16 U.S.C. §1132(b), 16 U.S.C. §1131(a).

[20a]16 U.S.C. §1131(c).

[20b]16 U.S.C. §1131(a).

E. Under the ruling of the Appeals Court in this case, the Secretary can manage any wilderness area for purposes inconsistent with those of the Wilderness Act using the guise of administrative discretion.

The Appeals Court has allowed the Secretary to use commercial logging as a management tool in the BWCA ostensibly because it is a legitimate management tool. Insofar as the court held that commercial logging is a legitimate management tool for maintaining the wilderness character of the BWCA[21] this holding flies in the face of all the evidence. Insofar as it decrees that "maintaining diversity, and a variety of successional stages" is a legitimate objective of wilderness management it goes against the plain meaning of the Wilderness Act. Although management of the BWCA is governed partially by a special provision of the Wilderness Act, other provisions of the Act provide ample room for the introduction of logging in other areas if the scope of the Secretary's discretion is as large as the Appeals Court has held. For example, the Act provides that ". . . such measures may be taken as may be necessary in the control of fire, insects, and disease, subject to such conditions as the Secretary deems desirable."[22] This provision was not used as a justification for commercial logging in this case but if the Secretary's discretion is so broad, there is no reason why he could not use commercial logging to control fire, insects, and disease even though other methods might accomplish the same result consistent with preservation of wilderness character as mandated by the Act.

[21]Or the primitive character, to use the language of 16 U.S.C. §1133(d) (5).
[22]16 U.S.C. §1133(d) (1).

Similarly, the Act grants special privileges to prospectors[23] and for use of water resources[24] and allows commercial services in a wilderness area to the extent necessary for activities which are proper for realizing the recreational or other wilderness purposes of the area."[25] If such exceptions allow the Secretary to redefine the management objectives of the Wilderness Act—as the Court of Appeals indicates they do—they will swallow up the rule of preservation. It must be recognized that exceptions are subject to the overall requirement to preserve wilderness character. Where an agency adopts a non-wilderness management policy to manage a wilderness area, the courts must enforce obeisance to the language and purpose of the Act.

CONCLUSION

If the decision of the Eighth Circuit Court of Appeals lifting the injunction against logging in the Boundary Waters Canoe Area is not reviewed, irreparable damage could be inflicted upon a unique and irreplaceable natural resource. At the very lease, commercial logging should await the comprehensive study of environmental effects mandated by the National Environmental Policy Act and the Supreme Court in *Kleppe v. Sierra Club*. The irrevocability of the effects of logging upon the virgin forests of the BWCA and the impossibility of ever returning these areas to their virgin state necessitate that such commercial logging be subject to the maximum scrutiny. Furthermore, the court's interpretation of the Wilderness Act grants enor-

[23]16 U.S.C. §1133(d) (2).
[24]16 U.S.C. §1133(d) (4).
[25]16 U.S.C. §1133(d) (6).

mous discretion to manage wilderness areas in ways inconsistent with the Act.

For the reasons stated in this petition, the Minnesota Public Interest Research Group respectfully urges that this Court grant the requested writ of certiorari.

Respectfully submitted,

ELLIOT C. ROTHENBERG
MICHAEL MILGROM
Attorneys for Petitioner
3036 University Avenue S.E.
Minneapolis, MN. 55414
(612) 376-7554